United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-1113

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

LEON VELEZ,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF ON BEHALF OF APPELLANT LEON VELEZ

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1113

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UNITED STATES OF AMERICA,

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REPLY BRIEF ON BEHALF OF
APPELLANT LEON VELEZ

RESPONDING TO GOVERNMENT'S BRIEF
POINT III - SUPPRESSION OF ALL SEIZED
CONVERSATIONS OF PERSONS NOT
NAMED IN THE WIRE TAP ORDERS
SHOULD BE SUPPRESSED

Most puzzling is the Government's attempt to avoid a decision by this Court as to the legality of the State's eaves-drop orders empowering the seizure of certain telephonic conversations by arguing that the issue was not raised below, therefore not reserved for appeal. As is obvious from the record and in (T 22-26)*, not only were appellants' applications regarding these orders denied on the merits, appellants desiring to join "in any motion ... is free to do so" (T 25). In addition, a good faith effort was made by defense

*Refers to minutes of trial transcript

counsel to avoid an avalanche of papers and duplication of motions to avoid general confusion; receiving the Court's permission that such application enure to the benefit of each co-defendant insofar as is applicable. It is most disturbing that the Government now seeks to take advantage of the defense counsel's efforts to ease the burden of the Court to avoid a decision by this Court on an important issue: the effect of a deliberate omission from the orders of the names of parties to seized telephone conversations whose voices the authorities monitored over an extensive period of time.

In U.S. v. Chiarizio, 525 F. 2d 289, 292, this Court held

> "... an individual must be identified in the wire tap application and subsequent court order when the law enforcement authorities have probable cause to believe that 'that individual ... is committing the offenses for which the wire tap order is sought' the federal agents have sufficient evidence to establish probable cause with respect to an individual who will probably be intercepted by the wire tap, that individual must be advised by name in the application order. If such speaker identification does not occur, the application and orders are statutorily invalid and the evidence derived thereform is inadmissible in a court of law.
>
> . . .
>
> Of course, we would be extremely concerned if it became a common practice for Government agents to justify in retrospect the names omitted from wire tap applications on the ground that Government agents had forgotten or ignored important evidence already in the Government's possession."

Since the identity of the conversants was known to the Government and there was sufficient time to obtain amendments to the orders, these conversations must be suppressed. Conceding arguendo that the authorities need not obtain an amended order as soon as they discover the identity of a new speaker, not obtaining such an order after the lapse of two months invalidates the wire taps. See U.S. v. Principie, 531 F.2d 1132 (2nd Cir. 1976). In the case of Leon Velez, his voice was first intercepted and monitored March 13 or 15 of 1974. After a hiatus of almost two months, Leon Velez's voice was again heard by the authorities on May 8 and 9 of 1974, giving them two months in which to amend their wire tap orders. As to the other appellants, the time span is contained in appellants' joint brief, pages 63 and 64.

Such deliberate omissions violate direct and substantive provisions of Title III mandating suppression of all seized conversations as to the party the authorities caused to be hidden from judicial scrutiny. See U.S. v. Giordiano, 416 U.S. 505, U.S. v. Chavez, 416 U.S. 562. It is of no moment that the orders were issued by the New York State Supreme Court

> "Here, the two conversations in issue were used in federal proceedings. Thus, despite the fact that the interceptions were made pursuant to a State court authorization, at the very least the other requirements of Title III ... must be satisfied."

Not following the disclosure requirements of Title III

has resulted in the setting aside of wire tap orders in U.S. v. Donovan, 513 F. 2d 337 (6th Cir. 1975); U.S. v. Moore, 513 F. 2d 485 (D.C. Cir. 1975); and U.S. v. Bernstein, 509 F. 2d 996 (4th Cir. 1975). See also U.S. v. Gigante, ___F. 2d ___, Dec. 6/22/76 No. 76-1128, where this Court upheld the setting aside of wire tap orders that were not sealed in conformity with Title III.

CONCLUSION

THE WIRE TAP ORDERS SHOULD BE SET ASIDE AND THE CONVERSATIONS SEIZED THEREUNDER SUPPRESSED.

Respectfully submitted,

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August, 1976

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of August 197 6 deponent served the within Brief upon:

U.S. Atty., So. Dist. of N.Y.

attorney(s) for
Appellee

in this action, at

1 St. Andrews Pl. , NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 18
day of August, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977